No. 420

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1965

BANCO DO BRASIL, S. A., *Petitioner*,

v.

A. C. ISRAEL COMMODITY CO., INC., *Respondent*.

On Petition for a Writ of Certiorari to the Court of Appeals of the State of New York

PETITIONER'S REPLY BRIEF

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Respondent in his Brief in Opposition, p. 5, asserts that this Court is without jurisdiction to grant the writ of certiorari in the case at bar because the judgment for which review is sought is not "final" within the meaning of 28 U.S.C. § 1257. The error of that assertion is clearly shown by analysis. Moreover, respondent's views seem based largely on the reasoning of the ma-

jority in *Montgomery Building and Construction Trades Council* v. *Ledbetter Erection Company*, 344 U.S. 178, which if not specifically overruled at the last term of court was expressly not followed. *Local 438 Construction and General Laborers' Union AFL-CIO* v. *Curry*, 371 U.S. 542.

Contrary to respondent's position, this Court's rule concerning finality for purposes of review under § 1257 is not a mechanical one to be applied on the basis of form with substance ignored. *Radio Station WOW, Inc.* v. *Johnson*, 326 U.S. 120; *Market Street R. Co.* v. *R.R. Comm. of California*, 324 U.S. 548, 551, and the designation given the judgment by the state practice is not controlling. *Department of Banking* v. *Pink*, 317 U.S. 264, 268. Rather, this Court makes its own ruling on finality after a review of the record, to determine whether there is anything more to be decided. *Gospel Army* v. *City of Los Angeles*, 331 U.S. 543, 547; *Richfield Oil Corporation* v. *State Board of Equalization*, 329 U.S. 69, 72; *Local 438 Construction and General Laborers' Union AFL-CIO* v. *Curry*, *supra*. This Court has said that for purposes of review, the state court's judgment is final if it is "subject to no further review or correction in any other state tribunal:" and is "an effective determination of the litigation and not of merely interlocutory or intermediate steps therein." *Market Street R. Co.* v. *R.R. Comm. of California*, *supra*, p. 551.

The highest court of the State of New York in answering a question certified to it has held that petitioner's complaint does not state a cause of action. That holding was based upon New York State's public policy and, accordingly, there is no amendment to the complaint which can correct its asserted defect. The high-

est court having thus ruled on the merits, there is no discretion in any lower court. Any action which can be taken by any New York State court is as ministerial and mechanical in nature as the entry of judgment on the remittitur. *United States* v. *Pink*, 36 N.Y.S. 2d 961, 965 (1942); *Ex parte Sibbald*, 37 U.S. 488, 492. For any and all practical purposes, the litigation is ended.

> "It is elementary that the decision of an appellate tribunal upon a prior appeal will, in general, be accepted as the law of the case upon a later appeal in the same case and in the same court. The questions of law settled by the court on a prior appeal in the same case will not be reviewed on a second or further appeal." 9, Carmody-Wait, *N. Y. Practice* § 447, p. 144.

The fact that the lower court took action, subsequent to the lower court decision appealed to the Court of Appeals, in the form of granting a "housekeeping" motion (the dismissal of the complaint to clear the docket) with petitioner noting an appeal to preserve the case pending a determination of this petition for certiorari, can make no difference. *Pope* v. *Atlantic Coastline R. Co.*, 345 U.S. 379; *Radio Station WOW, Inc.* v. *Johnson*, *supra*. And, that fact is not altered by any remote possibility that the Court of Appeals at a later date might change its mind. *Market Street R. Co.* v. *R. R. Comm. of California*, *supra*, p. 551.

Petitioner can make no further legal or factual contentions in the state courts of New York and relies solely upon the federal question presented by his petition. Unless there is review in this Court, the action of the New York Court of Appeals is as final as death insofar as petitioner's case is concerned.

There can be no doubt that on the facts as shown by the record of this case the judgment of the New York Court of Appeals meets all the requirements of finality as defined by this Court for the purposes of review under § 1257. *Pope* v. *Atlantic Coastline R. Co., supra; Local No. 438, Construction and General Laborers' Union AFL-CIO* v. *Curry, supra; Mercantile National Bank at Dallas* v. *Langdeau*, 371 U.S. 555.

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